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ABSTRACT

Americans traditionally have looked to the public schools to play a role in transmitting society's values to students, and on various occasions the U.S. Supreme Court has emphasized the role of the nation's schools in inculcating basic values. For many years Maine has had a statute mandating the teaching of virtue and morality and another that mandates teaching about the nation's flag. The task of identifying what values are to be taught and their role in the curriculum, however, is entrusted for the most part to local school boards. Despite the broad discretion given to local boards in determining curriculum and managing the schools, some specific legal constraints apply to the teaching of values. This paper is a survey of some of the major legal issues implicated in efforts to teach or instill values in the public schools. The major doctrinal areas of legal constraints on values instruction discussed in the paper are: (1) religion; (2) political orthodoxy; (3) teacher versus personal affirmation; (4) parental rights; and (5) teachers' academic freedom. A legal case in Maine (Solmitz v. M.S.A.D. No. 59) involving an effort to inculcate values in the schools is presented as a case study. (DB)

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LEGAL IMPLICATIONS OF VALUES EDUCATION

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"Teaching Citizenship and Values
in the Public Schools"

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LEGAL IMPLICATIONS OF VALUES EDUCATION

I. INTRODUCTION

This memorandum discusses some of the major legal issues implicated in efforts to teach or inculcate values in the public schools. It is intended to be a general survey of the field rather than a detailed treatise.

II. THE SCHOOLS' ROLE IN TRANSMITTING VALUES

A. Legal Justification and Mandate for Values Education.

Americans traditionally have looked to the public schools to play a role in transmitting society's values to students. On various occasions the United States Supreme Court has emphasized the role of the nation's schools in inculcating basic values, describing schools as conveying "fundamental values necessary to the maintenance of a democratic political system" 1/ and the "shared values of a civilized social order." 2/ Moreover, the Court has stated that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values, be they social, moral or political." 3/

For many years Maine has had a statute that mandates the teaching of virtue and morality. The statute was revised most recently in 1983 and currently states:

> Instructors of youth in public or private institution shall use their best endeavors to impress on the minds of the children and youth committed to their care and instruction the principles of morality and justice and a sacred regard for truth; love of country, humanity and a universal benevolence; the great principles of humanity as illustrated by kindness to birds and animals and regard for all factors which contribute to the well-being of man; industry and frugality; chastity, moderation and

temperance; and all other virtues which ornament human society; and to lead those under their care, as their ages and capacities admit, into a particular understanding of the tendency of such virtues to preserve and perfect a republican constitution, secure the blessings of liberty and to promote their future happiness. 4/

Maine statutes also contain a section mandating teaching about our nation's flag:

"It shall be the duty of instructors to impress upon the youth by suitable references and observances the significance of the flag, to teach them the cost, the object and principles of our government, the inestimable sacrifices made by the founders of our Nation, the important contribution made by all who have served in the armed services of our country since its inception and to teach them to love, honor, and respect the flag of our country that costs so much and is so dear to every true American citizen. 5/

Many people believe that schools have failed in their efforts to inculcate basic values in students. One discerning commentator has stated:

The schools' apparent failure to carry out fully this values mission may reflect a fundamentally insoluble values crisis at the core of contemporary society. The loss of traditional institutional anchors may have cast society irremediably adrift. We should not accept such an ultimately pessimistic assessment, however, unless it is clear that the schools and other contemporary institutions have pursued all feasible means to convey substantive values that are responsive to contemporary needs. In order to do so in a dynamic pluralistic society, we need to confront critical questions, such as "Can our public school system enumerate and have accepted by the community a common core of values?" and "Can values be endorsed in our community without endangering individual freedom?" 6/

B. <u>The Role of the Local School Board</u>

The task of identifying which values are to be taught and their role in the curriculum is entrusted for the most part to local school boards. Maine's education statutes provide:

> It is the intent of the Legislature that the control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units, as long as those units are in compliance with local state statutes.[7]

Additionally, the statutes provide that the local school board "shall direct the general course of instruction."[8] The Maine Supreme Judicial Court agrees that a local school board "has wide latitude in managing the curriculum of its schools . . . ."[9] Therefore, even to the extent values have been identified by statute, as a practical matter the school board determines how those values are to be incorporated into the curriculum.

Some values are established at the national level rather than state or local levels. From the United States Constitution can be derived many important values such as one man one vote, our republican form of government, freedoms of speech and religion, due process, equal rights, and so forth. Again, however, the manner in which such national values are emphasized and inculcated is left largely to the discretion of local school units.

III. LEGAL CONSTRAINTS ON VALUES INSTRUCTION

In light of the broad discretion given to local school units in determining curriculum and managing the schools, it is usually appropriate to assume that schools are free to teach or promote a particular value unless a specific legal constraint applies.

A. Religion

The United States Constitution specifically prohibits the government from establishing religion. [10] Establishment issues are analyzed under a three-prong test enunciated by the Supreme Court: (1) the government action must have a secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive entanglement with religion.[11]

Therefore, any organized or officially sanctioned prayer or devotional bible reading is prohibited.[12] Statutes allowing periods of silence will be unconstitutional if it is determined they had a religious purpose.[13] In this regard a Maine statute authorizes a school board to require a moment of silence "for reflection or meditation."[14]

Whenever a particular item in the curriculum or any school action is arguably motivated by religious considerations, a legal challenge can be expected. In an interesting recent case, a Missouri school board's rule prohibiting school dances was declared unconstitutional by a federal district court which determined that the rule was based on religious objections to dancing, but the 8th Circuit Court of Appeals reversed, and the Supreme Court declined to review the case; thus, the dancing ban was upheld.[15]

From the other side, in some cases it has been contended that schools are impermissibly hostile to religion. A challenge can assert interference with an individual's free exercise of religion, or that the school has "established"

anti-religious doctrine. Significantly, no case has yet held that a particular curriculum unconstitutionally establishes secularism. 16/ Such an argument appears to be analytically sound, but would require compelling facts in order to be ultimately successful. Most courts are very reluctant to step into the quagmire of policing every statement that could be construed as contrary to the religious teaching of any particular sect.

B. Political Orthodoxy.

Schools cannot teach partisan political orthodoxy such as endorsing Republicans over Democrats, or vice versa. Although schools cannot espouse particular partisan political views, they can teach those political values that are considered common or shared, such as democracy, equal rights, the right to vote, and so forth. This subject area presents tension between the teaching of patriotic attitudes on the one hand and individual rights of free speech on the other. In oft-quoted language Justice Jackson of the Supreme Court wrote in the Barnette case that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by words or act their faith therein." 17/

Students' rights to freedom of expression were strengthened in the landmark 1969 Supreme Court decision in Tinker v. Des Moines Independent Community School District. 18/ In ruling that a school could not suspend students for wearing

black armbands in protest of the Vietnam War, the Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The standard applied was whether the speech materially disrupts classwork or invades the rights of others.

The tension between a school board's ability to inculcate political values and a student's First Amendment rights came to a head in the recent case of Bethel School District v. Fraser. A high school student nominating another student for office at a school assembly used sexually suggestive speech. The lower federal courts declared the suspension unconstitutional under the Tinker "material disruption" standard. However, the Supreme Court upheld the student's suspension, ruling that the school appropriately could inculcate the "habits and values of civility" that not only are individual character values but also promote the political values of respect for others and civil discourse:

> These fundamental values of "habits and manners of civility," essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of sensibilities of others, and, in the case of a school, the sensibilities of fellow students. 19/

In assessing the various Supreme Court cases involving students' freedom of speech, one commentator concluded:

> Taken together, [the Supreme Court cases] not only articulate a qualified application of First Amendment free speech doctrine to the schools, but they also provide prime illustration of the important complementary role that courts and local school communities should play in values formulations. The

> Supreme Court has established as a preeminent national value that First Amendment free speech rights must apply within the schoolhouse gates, but it has left to each state and each local school board broad discretion to balance that right with other local community values inculcation priorities. 20/

C. Teaching Versus Personal Affirmation

Schools can teach particular values to its students but as a general principle cannot require students to affirm personally those values. Justice Jackson's statement reproduced on page 5 above is a well-known exposition of this principle which balances the community's prerogative to inculcate values in its students and the individual student's constitutional right to freedom of conscience and expression. As an example of this principle, many state statutes have continued to mandate flag salute programs, and courts have upheld such statutes so long as students and teachers who dissent for any reason are permitted to stand aside or leave the room. 21/

Notwithstanding the broad language used by Justice Jackson, schools clearly can require that students conform their behavior to certain values essential to an orderly school environment. Schools may enforce accepted rules of behavior at school notwithstanding a student's stated philosophical objections to the rules.

D. Parental Rights

The exact parameters of parental rights with respect to their children's education are not clear. It is established that parents have the right to send their children to private schools, 22/ and that Amish parents may withhold their children

from secondary school for religious reasons. [23] With respect to parental authority, one commentator has stated:

> Parents' rights to enforce the teaching of their own values are reinforced each time the schools are successfully charged with a failure to teach values or with enforcing wrong or bureaucratically perverted values. It is not altogether clear, however, how paramount the parental rights can be when they are faced with the legitimate claims of the state. Inquiry into the legitimacy of claimed parental rights becomes even more intense when those rights are confronted with the rights of the children themselves. [24] . . . [Thus,] the rights of parents to impose their values on their children are no longer iron clad. [25]

It is common for school districts to make some accommodation to parental objections to particular textbooks or topics of instruction (such as sex education). The extent to which such accommodation is legally required is uncertain, but reasonable accommodation frequently makes sense both to avoid possible legal challenge and to maintain support for the public schools.

A federal statute provides parents certain rights concerning the psychological evaluation of a student. The Hatch Amendment prohibits schools from requiring psychiatric or psychological examination, testing or treatment in which the primary purpose is to reveal information concerning certain specified categories such as political affiliations, sexual behavior and attitudes, and so forth.[26]

Potential legal problems arise from the Hatch Amendment regulations which define psychiatric and psychological examination, testing or treatment quite broadly:

(1) "Psychiatric or psychological examination or test" means "a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, trades, opinions, beliefs or feelings."

(2) "Psychiatric or psychological treatment" means "an activity involving the planned systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional or attitudinal characteristics of an individual or group."27/

The regulations appear to go beyond the intent of the statute and can be interpreted as applying to a very wide range of accepted classroom and disciplinary activities. Many educators are now familiar with form letters from parents referring to the Hatch Amendment and demanding that the school obtain parental consent before carrying out a laundry list of activities, such as "discussions of situations involving moral issues."

E. Teachers' Academic Freedom.

Just as a school board cannot impose a curriculum that violates the establishment clause, teachers are similarly prohibited from promoting a particular religion or any religion in the classroom. 28/ On the other hand, a school board may not punish a teacher for mentioning "the very existence of an entire system of respected human thought," such as evolution.29/

The difficult issue arises when teachers claim an academic freedom right to discuss ideas and select instructional materials that the school board does not approve. The Supreme Court has not decided whether a public school teacher has a First Amendment right of academic freedom in classroom discussion or selection of instructional materials, but some decisions suggest teachers have certain rights to freedom of expression in the classroom that must be recognized and limit to some extent the authority of school boards in controlling the curriculum. 30/ Three recent Supreme Court decisions suggest that the Court may well frame the issue in such cases in terms of whether teachers or school boards have the ultimate authority over curriculum decisions. 31/ If the issue is framed in those terms, all indications are that the school board has ultimate authority absent unusual facts.

IV. A CASE STUDY: SOLMITZ V. M.S.A.D. NO. 59.

In 1985 the Maine Supreme Judicial Court decided the case of Solmitz v. M.S.A.D. No. 59. 32/ The case, which attracted a great deal of publicity in Maine and across the nation, presents an interesting study of one effort to inculcate values in the schools. In ruling that the local school board acted permissibly in canceling a proposed seminar on tolerance arranged by a teacher, the court touched on a number of important legal points and did not find it necessary to reach others which are still unresolved.

In the fall of 1984, David Solmitz, a teacher at Madison High School, began planning an all day symposium on tolerance

in reaction to the tragic drowning of a Bangor homosexual by three Bangor High School students. The program, which became known as Tolerance Day, was designed to bring to the school representatives of a number of different groups who experienced prejudice in society, and was planned to replace scheduled classes throughout the school day. Concerned over possible disruptions and complaints from parents, school administrators advised Solmitz that he should not invite a homosexual to speak on Tolerance Day. With the involvement of attorneys on both sides, Solmitz and Superintendent of Schools Robert Woodbury reached a compromise whereby an invited lesbian speaker, Dale McCormick, could participate. Under the compromise the program would be modified to take up less of the school day and to give students options as to which speakers they might choose to hear or of attending a study hall. News of the proposed program appeared in the local papers and school administrators received 50 or more telephone calls and visits from people critical of McCormick's scheduled appearance. Some callers suggested that picketing might occur, some parents threatened to keep their children out of school or to attend school themselves to monitor the program, and a few phone calls warned the school board to expect bomb threats and a sabotaging of the school furnace.

As a result of the telephone calls and visits, the school board voted unanimously to cancel Tolerance Day because of concerns about possible disruption at the school and the adverse educational impact. Dale McCormick, David Solmitz, and

a student filed suit against M.S.A.D. No. 59 claiming that the school board violated plaintiffs' constitutional rights by canceling the Tolerance Day program.

The court addressed each of the plaintiffs' claims separately. With respect to David Solmitz, the court determined that whatever a teacher's academic freedom rights may be, they do not permit a teacher to insist upon a given curriculum for the whole school. The court noted that the school board's action did not infringe "on any way upon his right to teach his assigned courses as he deemed appropriate, or to express himself freely on tolerance, prejudice against homosexuals, or any other subject."[33/]

The court specifically credited the trial court's findings that the decisive factor in the school board's decision was concern about the disruption of educational activities, not a desire to suppress ideas.

With respect to the student, the court concluded that students have no rights to demand a curriculum of their own choice. The court again specifically noted that the program was cancelled for safety, order and security reasons, not in an attempt to cast an impermissible "pall of orthodoxy" over the school.[34/]

As for the invited speaker, Dale McCormick, the court ruled that Madison High School was not a public forum or a limited public forum, thus outside speakers had no right to attend.

The Solmitz case illustrates a number of the issues that might arise concerning values education:

(a) The program was an attempt to promote a specific value, tolerance.

(b) The program met with opposition from some parents and citizens. Opposition could have ranged from disagreement with the endorsed value to concern that the program's message might go beyond tolerance and involve endorsement of a sexual lifestyle at odds with the community's values. It can be expected that people will disagree on the purpose and likely effect of a values program.

(c) Had it been so inclined, the school board could have approved the program without significant risk of successful legal challenge. The tentative compromise, allowing students freedom to choose among speakers (or to attend study hall) mitigated potential criticism that the school board was mandating or endorsing a controversial value.

(d) The fact that the program was proposed by a teacher and rejected by the school board raised the question of academic freedom. The court clearly ruled that a teacher's rights do not extend to schoolwide programs. Left unresolved is the question of whether the school board would have had the right to cancel such a program if it had been scheduled solely for David Solmitz' classroom.

(e) The court reaffirmed the broad discretion of school boards, and analyzed plaintiffs' claims "in the context

of the broad discretion granted school boards in discharging their responsibilities for the curriculum in public schools."35/ In matters concerning curriculum, the presumption will be in favor of the authority of the school board.

(f) The factual findings that the school board was motivated by concerns of disruption of educational activities, rather than objection to the content of the program, made the case relatively easy to decide, as reflected by the court's unanimous vote. Had the court found that the school board was acting on other motivations, the legal issues would have been more difficult. Since the determination of appropriate values to be inserted into the curriculum is generally a matter for the school board rather than for a teacher, would the school board have been allowed to cancel the program on the ground that it chose to promote the value of transmitting community sexual attitudes rather than the value of tolerance toward homosexuals? Inherent in the concept of allowing local determination of values is a possibility that the values chosen by one school board might be different than those selected by another school board or a court.

(g) Assuming that the school board has the right to promote community sexual attitudes, must it allow speech contrary to that value? The inference from the court's opinion is that the school board cannot prevent the

teacher from making his personal statements concerning the value of tolerance, but it less clear whether the teacher would be able to bring in an outside speaker to promote a value that the school board does not want to support.

(h) Values or objectives can conflict. The Solmitz case is consistent with the school board approving the concept and value of the Tolerance Day Program, but under the particular facts of the case it decided that its benefits would be outweighed by the potential disruptive effects to the educational process.

V. CONCLUSION

The issue of teaching values in the public schools implicates a number of legal issues, many of which are unresolved . Careful attention to existing case law, consideration of competing interests and a flexible approach that allows input and reasonable accommodation can help reduce potential legal problems.

FOOTNOTES

1/ Ambach v. Norwick, 441 U.S. 68, 77 (1979).

2/ Bethel School Dist. v. Fraser, 478 U.S. 675, 683 (1986).

3/ Board of Educ. v. Pico, 457 U.S. 853, 864 (1982).

4/ 20 M.R.S.A. § 1221. Until 1983 the same chapter of Title 20 contained sections mandating instruction on the foundations of American freedom (former 20 M.R.S.A. § 1222), mandating scripture reading (former 20 M.R.S.A. § 1223) and authorizing local school boards to provide for moral instruction (former 20 M.R.S.A. § 1224). The section mandating scripture reading was recognized as unconstitutional long prior to its repeal. See Atty. Gen. Report 1963-64, p. 61, 97.

20 M.R.S.A. § 1224-A provides for release time for students who participate in a course of moral instruction or a religious observance, at the option of the local school unit.

5/ 20-A M.R.S.A. § 4805(1).

6/ Rebell, "Schools, Values and the Courts," 7 Yale L. & Pol. Rev. 275, 276-77 (1989) (footnotes omitted).

7/ 20-A M.R.S.A. § 2(2).

8/ 20-A M.R.S.A. § 1001(6).

9/ Solmitz v. Maine School Administrative District No. 59, 495 A.2d 812, 818 (Me. 1985).

10/ "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

11/ Lemon v. Kurtzman, 403 U.S. 602 (1971).

12/ Engel v. Vitale, 370 U.S. 427 (1962); School District v. Schemp, 374 U.S. 203 (1963).

13/ Wallace v. Jaffree, at 105 S. Ct. 2479 (1985); May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985).

14/ 20-A M.R.S.A. § 4805(2).

15/ Clayton v. Place, 884 F.2d 376 (8th Cir. 1989), cert. den. 58 U.S.L.W. 3657 (1990).

16/ See, e.g., Smith v. Board of Educ., 827 F.2d 684 (11th Cir. 1987) (denying contention that teacher's neglect of religion's role in history amounts to an unconstitutional establishment of secular humanism).

17/ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

18/ 393 U.S. 503 (1969)

19/ Bethel School Dist. v. Fraser, 478 U.S. 675, 680 (1980).

20/ Rebell, supra note 6, at 309-10.

21/ See, e.g., Russo v. Central School District, 469 F.2d 623 (2d Cir. 1972); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969).

22/ Pierce v. Society of Sisters, 268 U.S. 510 (1925).

23/ See Wisconsin v. Yoder, 406 U.S. 205 (1972). But see Employment Div., Dep't of Human Resources v. Smith, 58 U.S.L.W. 4433 (1990). (Allowing a state to ban the use of peyote in religious ceremonies).

24/ Bereday, "Values, Education and the Law" 48 Miss. L. J. 585, 594 (1977).

25/ Id. at 597.

26/ 20 U.S.C. § 1232h(b).

27/ 34 C.F.R. § 98.4.

28/ Rhodes v. Laurel Highlands School Dist., 444 A.2d 562 (Pa. Commonwealth 1988) (affirming dismissal of a teacher for exceeding the constitutional boundaries within which teacher discourse about religion is permissible).

29/ Epperson v. Arkansas, 393 U.S. 97, 116 (1968).

30/ See, e.g., Tinker v. Des Moines Indep. Com. School Dist., 393 U.S. 503, 506 (1969) (stating that "teachers [do not] shed their constitutional rights to freedom of speech or expression at the school house gate."); Epperson v. Arkansas, 393 U.S. 90 (1968) (stating that "it is much too late to argue that the state may impose upon the teachers in its schools any conditions it chooses, however restrictive they may be of constitutional guarantees"); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (stating that "[t]he classroom is peculiarly the 'market place of ideas'"); Sweezy v. New Hampshire, 354 U.S. 324 (1957) (stating that "[t]eachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (containing language supportive of the concept of teacher academic freedom in the classrooms); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a statute that prohibited teaching foreign language in public or private schools before the eighth

grade as an unconstitutional restriction on the freedom of modern language teachers to pursue their profession).

31/ See, e.g., Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988); Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982).

32/ 495 A.2d 812 (Me. 1985)

33/ Id. at 817.

34/ Id. at 819.

35/ Id at 817.